



# *COMMONWEALTH of VIRGINIA*

## *DEPARTMENT OF ENVIRONMENTAL QUALITY*

### VALLEY REGIONAL OFFICE

P.O. Box 3000, Harrisonburg, Virginia 22801

(540) 574-7800 Fax (540) 574-7878

Physical Address: 4411 Early Road, Harrisonburg, VA

[www.deq.virginia.gov](http://www.deq.virginia.gov)

Matthew J. Strickler  
Secretary of Natural Resources

David K. Paylor  
Director

Amy Thatcher Owens  
Regional Director

## **STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO THE CITY OF LEXINGTON PC CASE: 2018-6036**

### **SECTION A: Purpose**

This is a Consent Order issued under the authority of Va. Code § 62.1-44.34:20, between the State Water Control Board and the City of Lexington for the purpose of resolving certain violations of the State Water Control Law and the applicable regulations.

### **SECTION B: Definitions**

Unless the context indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Aboveground storage tank" or "AST" means any one or combination of tanks, including pipes, used to contain an accumulation of oil at atmospheric pressure, and the volume of which, including the volume of the pipes, is more than ninety percent above the surface of the ground. This term does not include line pipe and breakout tanks of an interstate pipeline regulated under the Hazardous Liquid Pipeline Safety Act of 1979 or the Natural Gas Pipeline Safety Act of 1968, as amended.
2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.

3. "Containment and cleanup" means abatement, containment, removal and disposal of oil and, to the extent possible, the restoration of the environment to its existing state prior to an oil discharge.
4. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
5. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
6. "Discharge" means any spilling, leaking, pumping, pouring, emitting, emptying or dumping.
7. "Lexington" means the City of Lexington, a political subdivision of the Commonwealth of Virginia. Lexington is a "person" within the meaning of Va. Code § 62.1-44.3.
8. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
9. "Oil" means oil of any kind and in any form, including, but not limited to, petroleum and petroleum by-products, fuel oil, lubricating oils, sludge, oil refuse, oil mixed with other wastes, crude oils and all other liquid hydrocarbons regardless of specific gravity. *See* Va. Code §62.1-44.34:14.
10. "Operator" means any person who owns, operates, charters, rents or otherwise exercises control over or responsibility for a facility or a vehicle or vessel.
11. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
12. "Person" means any firm, corporation, association or partnership, one or more individuals, or any governmental unit or agency thereof.
13. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 11 (Va. Code §§ 62.1-44.34:14 through 62.1-44.34:23) of the State Water Control Law addresses discharge of oil into waters.
14. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3.
15. "Va. Code" means the Code of Virginia (1950), as amended.
16. "VAC" means the Virginia Administrative Code.

**SECTION C: Findings of Fact and Conclusions of Law**

1. Lexington owns and operates a public works and utility yard located at 890 Shop Road in Lexington, Virginia (Facility). The Facility is registered under the Underground Petroleum Storage Tank Program, FAC ID 6005244. The discharge was from an AST as opposed to the registered underground storage tanks.
2. On November 8, 2017, DEQ received a complaint regarding a strong odor coming from the Facility.
3. On November 17, 2017, DEQ staff inspected the Facility and observed a strong odor throughout. DEQ observed a discharge of petroleum on the ground at the Facility and did not receive a notification of the discharge.
4. Va. Code § 62.1-44.34:18 prohibits the discharge of oil into or upon state waters, lands, or storm drain systems that violate applicable water quality standards or cause a film or sheen upon or discoloration of the surface of the water.
5. Va. Code § 62.1-44.34:19 requires any person causing or permitting a discharge of 25 gallons or more of oil that enters, or may reasonably be expected to enter, state waters, lands or storm drain systems within the Commonwealth immediately upon learning of the discharge to notify the Board.
6. On November 28, 2017, DEQ issued Notice of Violation No. 2017-VRO-0014 to Lexington for the unpermitted discharge of oil onto state lands.
7. On December 11, 2017, DEQ staff met with Lexington staff to discuss the observations and next steps for the Facility. The clean-up coordination was referred to DEQ Remediation staff, PC 2018-6036. Lexington informed DEQ that a 100-gallon AST was ruptured during clean up activities on November 6, 2017, and approximately 25 gallons of diesel fuel was discharged at the Facility. Lexington confirmed that the discharge was not reported within 24 hours.
8. Throughout December 2017, Lexington submitted documentation to DEQ for review and approval, detailing the containment and cleanup at the Facility. A total of 103 tons of petroleum-impacted soil was excavated from the Facility and transported to an approved landfill.
9. On January 12, 2018, Lexington submitted a Limited Initial Abatement-Site Characterization Report (LSCR) to DEQ, which summarized the scope of the investigation and subsequent clean-up of the Facility; a corrected LSCR was submitted by Lexington to DEQ on January 18, 2018 and January 19, 2018, which addressed DEQ comments.

10. On July 3, 2018, DEQ remediation closed the Pollution Complaint case and issued a case closure letter, based on documentation that the post-excavation and clean up samples yielded results ranging from 5.2 ppm to 218 ppm of TPH-DRO, which are well within the acceptable levels of an industrial use Facility, and there were no further risks associated with the AST discharge.
11. Based on the results of the November 17, 2017 inspection, the December 11, 2017 meeting, and the documentation submitted on January 12, 2018, the State Water Control Board concludes that Lexington has violated Va. Code § 62.1-44.34:18 and Va. Code § 62.1-44.34:19, as described in paragraphs C(2) through C(10), above.

#### **SECTION D: Agreement and Order**

Accordingly, by virtue of the authority granted it in Va. Code § 62.1-44.34:20, the Board orders Lexington and Lexington agrees to:

Pay a civil charge of \$6,221.25 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 1104  
Richmond, Virginia 23218

Lexington shall include its Federal Employer Identification Number (FEIN) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Petroleum Storage Tank Fund (VPSTF). If the Department has to refer collection of moneys due under this Order to the Department of Law, Lexington shall be liable for attorneys' fees of 30% of the amount outstanding.

#### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of Lexington for good cause shown by Lexington, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order and in NOV No. 2017-VRO-0014, dated November 28, 2017. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent,

or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.

3. For purposes of this Order and subsequent actions with respect to this Order only, Lexington admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. Lexington consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. Lexington declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by Lexington to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Lexington shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. Lexington shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Lexington shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
  - a. the reasons for the delay or noncompliance;
  - b. the projected duration of any such delay or noncompliance;
  - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
  - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and Lexington. Nevertheless, Lexington agrees to be bound by any compliance date which precedes the effective date of this Order.
11. This Order shall continue in effect until:
  - a. the Director or his designee terminates the Order after Lexington has completed all of the requirements of the Order;
  - b. Lexington petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
  - c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to Lexington.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Lexington from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by Lexington and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
13. The undersigned representative of Lexington certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind Lexington to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of Lexington.
14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
15. By its signature below, Lexington voluntarily agrees to the issuance of this Order.

And it is so ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

---

Amy T. Owens, Regional Director  
Department of Environmental Quality

------(Remainder of Page Intentionally Blank)-----

The City of Lexington voluntarily agrees to the issuance of this Order.

Date: 1/29/19 By: [Signature], \_\_\_\_\_  
Noah A. Simon City Manager  
City of Lexington

Commonwealth of Virginia  
City/County of Lexington

The foregoing document was signed and acknowledged before me this 29th day of January, 2019, by Noah A. Simon who is City Manager of Lexington on behalf of the City of Lexington.

[Signature]  
Notary Public  
7725473  
Registration No.

My commission expires: 6/30/21

Notary seal:

